UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNIVERSAL FASTENERS, INC.

and Case 9-CA-35633

UNION OF NEEDLETRADES, INDUSTRIAL
AND TEXTILE EMPLOYEES (UNITE), AFL-CIO-CLC

UNIVERSAL FASTENERS, INC.

and Case 9-RD-1839

CHRIS SAYRE, AN INDIVIDUAL

and

LOCAL 267, UNION OF NEEDLETRADES,
INDUSTRIAL & TEXTILE EMPLOYEES (UNITE)

David L. Ness, Esq., for the General Counsel.
Richard R. Parker and *Laurie D. Chaudoin, Esqs.*, of Nashville, TN, for the Respondent.
Irwin H. Cutler, Esq., of Louisville, KY, for the Union.
Chris Sayre, of Lawrenceburg, KY, an individual, the Petitioner.

Decision

Statement of the Case

David L. Evans, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Cincinnati, Ohio, on June 1–3, 1998. Universal Fasteners, Inc. (the Respondent or the Employer) has plants in Lawrenceburg, Kentucky, and Centerville, Tennessee. The Respondent has never recognized a union at its Centerville plant, but for many years it has recognized Union of Needletrades, Industrial and Textile Employees (UNITE), and its Local 267, (jointly, the Union) as the representative of its Lawrenceburg production employees.[1] At Lawrenceburg, the Respondent and

[1] Actually, some of the labor organizations that the Respondent has so recognized have been predecessors of the Union. As discussed infra, the Respondent's machine shop employees have not been included in the unit that has been represented by the Union.

the Union entered a succession of collective-bargaining agreements; the last one of such was effective by its terms from January 1, 1995, through December 31, 1997.[2] On October 16, in case 9–RD–1839, employee Chris Sayre filed a petition to decertify the Union as the collective-bargaining representative of

[2] All dates mentioned are between June 1, 1997, and May 31, 1998, unless otherwise indicated.

the Lawrenceburg employees. Pursuant to a stipulated election agreement, an election was scheduled for November 21. On November 14, however, the Union filed a charge against the Respondent in case 9–CA–35483. Upon the filing of that charge, the Regional Director issued an order that postponed the election indefinitely. On January 12, the Union filed charge 9–CA–35633, but on January 21 the Union also filed a "Request to Proceed" with the decertification election notwithstanding the concurrent processing of the two charges that it had filed. Thereupon, the Regional Director scheduled the election for February 20.

The February 20 decertification election resulted in a tie. More particularly, 108 ballots were cast; 54 votes were cast for the Union and 54 votes were cast against it. Having failed to achieve a majority, the Union timely filed objections to conduct affecting the results of the election (the objections).[3] The objections allege that, during the period from the October 16 filing of the decertification petition through the holding of the February 20 election (the critical period), the Respondent engaged in conduct that deprived the employees of their free choice in that election. At some point, the Union withdrew the charge in case 9–CA–35483, but on April 10, the General Counsel issued a Complaint and Notice of Hearing (the complaint) in case 9–CA–35633. The complaint alleges that the Respondent had violated Section 8(a)(5) and (1) in two respects. First, the complaint alleges that the Respondent violated the Act by refusing to furnish the Union with certain information that is "necessary for, and relevant to, the Union's performance of its duties as the collective-bargaining representative of the employees in the [production] unit." Second, the complaint alleges that the Respondent unilaterally discontinued implementation of checkoff provisions that had been contained in the collective-bargaining agreement that had expired on December 31.

On April 17, 1998, the Regional Director issued a "Report on Objections to Election, Order Directing Hearing, Order Consolidating Cases, Order Transferring Cases to the Board and Notice of Hearing" which consolidated for hearing the issues raised by both the complaint and the objections. Upon the testimony and exhibits entered at trial,[4] and upon my observations of the demeanor of the witnesses,[5] and after consideration of the briefs that have been filed, I make the following findings of fact and conclusions of law.

I. Jurisdiction

As it admits, the Respondent is engaged in the production of clothing fasteners at its Lawrenceburg, Kentucky, plant. During the 12 months preceding issuance of the complaint, the Respondent, in conducting said operations, purchased and received goods valued in excess of $50,000 directly from suppliers located at points outside Kentucky. Therefore, at all relevant times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. As the Respondent further admits, the Union is a labor organization within the meaning of Section 2(5) of the Act.

[3] The Union filed 13 numbered objections to the election. Some of the objections are duplicative and will be discussed jointly. Additionally, the Union moved at the hearing to add another objection; I will discuss that motion infra.

[4] Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered. Where I quote a witness who re-starts an answer, *and that re-starting is meaningless*, I sometimes eliminate some of the redundant words; *e.g.*, "Doe said, he mentioned that ... " becomes "Doe mentioned that ... ". Without objection, the Union's post-hearing submission of its Exhibit 30 is received.

[5] Credibility resolutions are based on the demeanor of the witnesses and any other factors that I may mention.

II. The Complaint Allegations and the Objections

A. Refusal to Furnish Information

The complaint, at its paragraphs 8 and 9, alleges that the Union requested certain wage and benefit information on November 18 and that the Respondent has violated Section 8(a)(5) by refusing to furnish that information. The Union's Objection 10 makes the same allegation. The Respondent admits that it refused to furnish the information in issue, but it argues that it had a right to do so. The facts that are relevant to this allegation are undisputed.

The Respondent is a wholly-owned subsidiary of YKK Corporation of America which has its principal office in Macon, Georgia. Also in Macon, YKK Corporation of America owns another subsidiary, YKK(USA). YKK(USA) is engaged in the apparel industry also, but the exact nature of its product is not disclosed in the record. The production and maintenance employees at YKK(USA) are not represented by any labor organization.

Mark Mizumoto is the president of the Respondent; his office is out of the country. Paul Dedman is the Respondent's vice president in charge of manufacturing. Alan Bates is the Respondent's manager of human resources. William Wiley is the senior vice president in charge of industrial relations for YKK Corporation of America.

From Sayre's October 16 filing of the decertification petition through the February 20 election, the Respondent urged its employees to vote against the Union. Also during that period, the Respondent and the Union met several times in an effort to bargain for a successor to the collective-bargaining agreement that was scheduled to expire, and did expire, on December 31. As a part of its election campaign the Respondent employed the technique of establishing a box for employees' questions and then posting announcements in the form of answers to questions that purportedly had been submitted by employees. Also, on November 11 and 12, Dedman and Wiley jointly gave a speech and showed slides to the employees. (A copy of the speech, with stage directions for showing slides, was received in evidence.)

Part of the November 11-12 slide-projection presentation (the slides) contrasted wages of the unit employees with the wages of the unrepresented employees at the Respondent's Centerville plant. Also during this presentation, other slides contrasted certain benefits, other than wages, of the unit employees with the benefits of the unrepresented Centerville employees and with the benefits of the unrepresented employees at the Respondent's YKK(USA) plant in Macon.[6] At no point did the presentation mention the wages that were paid at YKK(USA). The point of the slide presentation, and the point of the accompanying narration by Dedman and Wiley, was that, without representation (and without paying union dues), the employees at Centerville were receiving better wages, and the employees of YKK(USA) were receiving more benefits, than the unit employees.

Thereafter the Union requested from the Respondent the same information that the Respondent had shown the unit employees, plus wage information about the YKK(USA) employees, purportedly for the purposes of using that information in the negotiations that were then being conducted. Ultimately, the

[6] In summary, the presentation represented that the YKK(USA) employees received nine benefits that the unit employees did not: dental insurance, a 401(k) retirement plan, a "Healthy Baby and Moms" program, managed behavioral care, vision care, a dependents' scholarship program, flexible term life insurance, universal life insurance, and a Christmas monetary bonus.

Respondent furnished the information about the Centerville employees, but it refused to furnish the information about the YKK(USA) employees claiming that it was not relevant to the collective-bargaining processes.[7] It is the Respondent's failure to furnish the wage and benefit information about the YKK(USA) employees that the complaint alleges to have violated Section 8(a)(5).[8]

Before an employer may be compelled to respond to a union's request for information, relevance of that information to the union's ability to function as the collective-bargaining representative must be established. In cases of a union's request for information about the terms and conditions of employment of the employees in a unit that is represented by the requesting union, relevance is presumed. Where, however, a union's request is for information about employees who are not in such a unit, the union must demonstrate that the requested information is "relevant to bargainable issues" and "would be of use to the union in carrying out its statutory duties and responsibilities." *Rockwell-Standard Corporation*, 410 F.2d 953, 957 (1969), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

The only case that the General Counsel cites for authority for the proposition that the Respondent was required to comply with the Union's request for the wage and benefit information about the YKK(USA) employees is *Lamar Outdoor Advertising*, 257 NLRB 90 (1981). In that case the union represented employees of Lamar Advertising Associates of Dayton, a corporate subsidiary of the Lamar Corporation. The union requested wage and benefit information about the Lamar Corporation employees and it requested wage and benefit information about the employees of several other of the Lamar Corporation's subsidiaries. After finding that the subsidiaries and the parent corporations were a single employer, the Board noted, at 93:

> The evidence indicates that the wage and fringe benefits at Dayton, and the positions taken by the Company with respect to such matters, were to a considerable extent influenced or compelled by the wage rates and benefits at other Lamar locations. The Company so indicated to its employees prior to the election.

In that posture of the case, the Board held that, under the liberal discovery-type standard established by *Acme Industrial Co.*, supra, the employer was required to furnish the information.

Unlike the facts in *Lamar*, however, the Respondent emphasized to the unit employees that their terms and conditions of employment were not in any way "influenced or compelled by the wage rates at other ... locations." The Respondent had preached to the employees that, because they were represented by the Union, their benefits *had not* been influenced by whatever forces or considerations that were responsible for the (better) benefits that were paid at YKK(USA). And the Respondent did not mention the wages that were paid at YKK(USA) at all. *Lamar*, therefore, does not support the General Counsel's position.

The Union cites *Ironton Publications, Inc.*, 294 NLRB 853 (1989), as authority for the proposition that the Employer had a duty to furnish all of the requested information. In *Ironton*, the employer was a subsidiary of Boone Newspapers, Inc. During bargaining, the employer announced that, for all of its unrepresented employees, it was adopting Boone's profit sharing plan. The union thereafter demanded information about Boone's profit sharing plan, and it demanded information about the wages and benefits of several other corporations that it believed were, like the employer involved in that case, subsidiaries of

[7] I credit the testimony of the General Counsel's witness Brown that on December 18 Wiley did show to the Union representatives the same slides that he had shown to the employees, but in doing so Wiley changed the slides so rapidly that intelligent note-taking was impossible.

[8] No allegation is made about the response to the Union's request for information about the Centerville employees.

Boone. The administrative law judge held that the union was entitled to all such information. The Board partially reversed. It held that the union had demonstrated relevance of the Boone profit sharing information because the employer had announced in bargaining that it was adopting Boone's plan for its unrepresented employees. The Board, however, did not even reach the issue of relevance of the wage and benefit information of the employees at the other entities that the union considered to be subsidiaries of Boone because there was no evidence that, in fact, the other entities were subsidiaries of Boone.

Ironton does not support the Union's claim. The final sentence of *Ironton* is that: "The General Counsel must show more than a nebulous and ill-defined relationship between the Respondent and the six other newspapers in order to create for the Respondent an obligation to provide the requested information." The Board did not, however, leave any implication that, had the union in *Ironton* established that the six other newspapers were, in fact, subsidiaries of Boone (as was the employer in that case), it would need to show no more. Perhaps if in *Irontown* the employer had stated in bargaining that it was adopting the wages and benefits of the other newspapers for its unrepresented employees, and those other newspapers had been co-subsidiaries of Boone, a violation may have been proved, and the case would be precedent for the General Counsel's claim here. That did not happen, however, and *Ironton* serves as no precedent for this case.

The Respondent did not announce in bargaining, or even in its election-campaign presentations to the unit employees, that it was adopting the wages and benefits of any other entity. The Respondent, again, announced that it *had not* made such adoption, and it used that fact as a campaign theme. The General Counsel and the Charging Party argue, and Union representatives claimed in bargaining, that possession of the wage and benefit information about YKK(USA) employees would have helped it decide if it was "appropriate" to demand during bargaining the same wages and benefits for the unit employees. It would have been "appropriate," of course, for the Union to demand any lawful contractual terms that it wanted. In making those demands, it could use as a model the terms and conditions of employment of any employees in the country (or out of the country, for that matter). The Union could not, however, demand that the Respondent produce for use as the Union's model for its bargaining demands the wage and benefit information of other employers where the Respondent had not suggested in bargaining (or even in the election campaign) that it had established (or, at least, was contemplating establishing) the wages and benefits of the unit employees by reference to the wages and benefits of other employees. That is, the Union could not effectively demand information about the wages or benefits of the YKK(USA) employees because the employer had not indicated, in any way, that it had established terms or conditions of employment of the unit employees by reference to the terms or conditions of employment of the YKK(USA) employees. Therefore, the Respondent had no obligation to comply with the Union's request for information about the wages and benefits of the YKK(USA) employees.[9] I shall therefore recommend dismissal of this allegation of the complaint, and I shall recommend the overruling of the Union's Objection 10.

B. Discontinuance of Checkoff After Contract Termination

The complaint, at its paragraph 10, alleges that, after the last contract between the parties terminated on December 31, the Respondent unilaterally discontinued implementing the checkoff provision of that contract and that by doing so the Respondent violated Section 8(a)(5). The Union's Objection 11 makes the same allegation. The Respondent admits that it unilaterally discontinued the checkoff provision on January 5, but it argues that it had a right to do so. The facts relevant to this allegation are also undisputed.

[9] A contrary result would mean that, solely by organizing any one subsidiary of a parent corporation, a union would automatically be entitled to demand all wage and benefit information of all other subsidiaries of that parent. This is something that the Board has never found to be the right of labor organizations.

The negotiated deduction-authorization form, pursuant to which the checkoff provision of the expired contract was implemented, provided that a unit employee who signs the form authorizes the Respondent to "pay the same to the Union or its designee pursuant to the provisions of any current or future collective-bargaining agreement." In arguing that the checkoff provision survived the termination of the last contract between the parties, the General Counsel states on brief that such language " . . . merely means that the agreement is the basis for the checkoff." In this argument, however, the General Counsel suggests no reason that the parties would have mentioned any "future" collective-bargaining agreement. The reference clearly indicates that the parties were in agreement that the effectiveness of the checkoff authorization provision that they had negotiated, in fact, depended on the existence of a supporting collective-bargaining agreement. Finally on this point, the General Counsel acknowledges on brief that, in *Bethlehem Steel*, 136 NLRB 1500 (1962), and in several cases which follow *Bethlehem Steel*, the Board rejected exactly the position that he takes herein. The General Counsel argues on brief that "It is urged that the *Bethlehem Steel* principle should be re-examined because ... ." I, of course, am bound by Board precedent. I shall therefore recommend the dismissal of this allegation of the complaint, and I shall recommend the overruling of the Union's Objection 11.

C. Unilateral Change of Grievance-Meeting Times

The Union's Objection 13 alleges that: "On or about October 15, 1997, and continuing at various times thereafter, the Employer unilaterally changed the starting times of grievance meetings." This alleged unilateral action is not the subject of the complaint.[10]

Earl Bruner, the Union's chief steward, testified that before the critical period the Employer and the Union met to discuss grievances immediately after the shifts during which grievances were filed. Bruner further testified that in "late October after the decertification," foreman Pam Powell refused to meet with the Union on a grievance that employee Jane Skimmerhorn had filed until two hours after Skimmerhorn's shift had ended at 7:00 a.m. The Employer admits a delay in meeting with the Union over Skimmerhorn's grievance, but it denies that it happened in "late October after the decertification" petition was filed. The documentary evidence supports the Employer's position.

On October 7, Skimmerhorn filed a grievance over a work assignment. The Union's grievance forms are pre-numbered, and Skimmerhorn's October 7 grievance was filed on form number 4176. On October 24, Bruner filed grievance number 4178 alleging that the Employer had forced Skimmerhorn to drop "Grievance No. 4176" by refusing to meet on the grievance until two hours after the end of the shift during which the grievance had been filed. That is, by the plain language of Bruner's October 24 grievance, the Union admitted that it was on October 7 that the Employer had delayed in meeting on Skimmerhorn's grievance. I therefore discredit Bruner's testimony that the Employer delayed in meeting on a grievance that was filed by Skimmerhorn after the decertification petition was filed. I further discredit other testimony by Bruner that the Employer also delayed meeting on a grievance that was filed on behalf of Skimmerhorn on October 15. Bruner's testimony was confused, but I do not believe innocently so; it is obvious that in his testimony Bruner was trying to engraft certain events of October 7 into an account of what supposedly happened on October 15 (or October 16, as Bruner's mendacity further enlarged his account). Moreover, if Bruner's testimony about an October 15 (or October 16) delay in meeting on a Skimmerhorn's grievance had had any truth to it, Bruner assuredly would have mentioned it in his grievance of October 24.[11]

The Union offered further testimony by Bruner that, after October 24, the Employer delayed meeting on other grievances. Dedman however, credibly testified that immediately after the delay in meeting on Skimmerhorn's October 7 grievance was brought to his attention, he ordered the supervisors to return to

[10] As well, none of the other remaining objections is a subject of the complaint.

[11] Although the Union introduced Bruner's October 24 grievance into evidence, it makes no attempt to explain why that grievance referred only to a delay in meeting on Skimmerhorn's October 7 grievance.

the practice of meeting with the Union immediately after the shifts during which grievances were filed. In view of Bruner's demonstrated unreliability, I accept Dedman's testimony on this point. I therefore find that the Union has failed to demonstrate by the preponderance of the probative evidence that, during the critical period, the Employer unilaterally changed the times for meetings on grievances. Finally, the Union offers no reason, or authority, for the proposition that the alleged delays would have affected the results of the election. I shall therefore recommend dismissal of the Union's Objection 13.

D. Interrogations by Distributions of Insignia

The Union introduced testimony, and it is undisputed, that during the day before the election supervisors went throughout the plant carrying several baseball-style caps, each of which had the Company's logo on its crown. The supervisors asked each employee if he or she wanted one; if the employee responded affirmatively, the supervisor gave him or her one. The Union concedes that in the past the Employer had given other clothing or trinkets to the employees,[12] but only on special occasions[13] and only by simply passing things out (rather than giving employees an opportunity to refuse the proffered items). The Union contends that in this case there was no special occasion, other than the election, and the employees were not simply given the caps; they were asked first if they wanted one, and the employee had to respond affirmatively to get one. Under these circumstances, the Union further contends, the offering of the caps was a method of systematic interrogations and conduct that would have destroyed the laboratory conditions required for the conduct of Board elections.[14]

The Employer does not contend that there was any special occasion that prompted the distribution of the caps; indeed, the Employer offers no reason for the distribution of the caps on the day before the Board election. The Employer does, however, contend that during all prior distributions of clothing or trinkets the employees also were asked if they wanted whatever was being distributed.

In *Oklahoma Installation Co.*, 309 NLRB 776 (1992), the employer distributed T-shirts and caps bearing its logo and, at the same time, it distributed letters that urged the employees to vote against a union in a Board election that was to be conducted within about a week. The administrative law judge, citing several cases that found unlawful interrogations in distributions of "Vote-No" buttons or caps, found a violation of Section 8(a)(1). The Board reversed, stating:

> In this case, although the items of clothing distributed by the respondent did display the company logo, the record does not reveal that they included any additional writing or insignia indicating an explicit pro-employer or anti-union preference in the upcoming election. Nor does the record show that any employee was required or even asked to wear the clothing proffered by the Respondent, to display or show others the "Vote-No" letter, or refrain from wearing or displaying union insignia.Thus, in the circumstances of this case, we do not find that the respondent attempted to pressure employees to make an observable choice or open acknowledgment concerning their campaign position.

Accordingly, the Board dismissed the Section 8(a)(1) allegation.

On brief, the Union seeks to distinguish *Oklahoma Installation* by stating, "... this is not a case in which an employer distributed to all employees paraphernalia bearing the employer's logo. Here, the Company chose to offer to employees the opportunity to receive paraphernalia bearing its logo, if they chose to accept it." Without a specific finding in the case, I would not read *Oklahoma Installation* to

[12] These things included jackets, T-shirts, paper weights, coffee mugs, pocket-protectors and such.
[13] These occasions included such as the Company's centennial anniversary, an open house, and a certification of excellence by an independent quality control examiner.
[14] In the objections that it filed, the Union further contended that the caps constituted an objectionable grant of a benefit, but it does not argue the point on brief.

imply that the employer there gave the employees no chance to reject what was offered. Nor do I believe the Union's testimony to the effect that, in the past, the Employer gave the unit employees no chance to reject whatever was being distributed. Not to have allowed rejections by employees who did not want whatever was being distributed would have been wasteful, and, at least in the case of the jackets that the Employer once distributed, employee cooperation regarding size-specification would have been required.

Oklahoma Installation is a stronger case for an objecting union than this one. There, the employer presented the employees with anti-union propaganda at the same time that it presented the T-shirts that bore the company's logo. Nevertheless, the Board found no violation of the Act because an acceptance of a T-shirt did not constitute a declaration of preference in the coming Board election. That is, even though the clothing with the company logo was delivered with an anti-union message, the Board did not find that the company logo was the equivalent of a "Vote-No" message that required the employees to declare their preference. That, essentially, is the Union's position in this case. I shall therefore recommend dismissal of this objection.

E. Machine Shop Wage Increases

Historically, the Union has not represented the Employer's machine shop employees. Those employees have been represented by a local union of the International Association of Machinists. The Union's Objection 1 alleges that: "In or about the first week of February 1998, the Employer granted a wage increase and other benefits to employees working in its machine shop who are not in the bargaining unit in order to discourage employees in the bargaining unit from supporting the Union."

Shortly before February, the Employer withdrew recognition from the International Association of Machinists, and that withdrawal has not been challenged under the Act. The Respondent admits that on February 2 it announced increases in wages and other benefits to the machine shop employees. On that date Larry Dalzell, manager of the Employer's engineering department, read a statement to the machine shop employees stating, *inter alia*, that they and the Centerville employees would be receiving 4% wage increases, increases in life insurance benefits, a 401(k) plan, and an employee handbook. The Employer contends, and it is not contradicted, that wage increases had been given to the machine shop employees in previous Februaries, albeit in somewhat lesser amounts.

The Union offered no evidence that the Employer granted the benefits to the machine shop employees "in order to discourage" support for the Union among employees in the production unit. Therefore, the Union is left in the position of arguing that a grant of benefits to employees in one unit is *per se* conduct that affects the free choice of employees in another unit. On brief, the Union cites no authority for such a proposition. As its only argument, the Union contends that: "By granting these increases and new benefits to the machine shop employees, the Company reinforced the theme of its campaign that employees would receive the better benefits if only they would vote the Union out." The issue of unlawful promises of benefits will be discussed below. At this point, however, I consider only the Union's separate objection that the act of granting benefits to non-unit employees, alone, interfered with the employees' free choice in the February 20 election. The argument that the grant to the machine shop employees "reinforced" promises made to the employees is, however, no argument that the grant, itself, was objectionable conduct. There being no authority or valid argument in support of this objection, I shall recommend that it be overruled.

F. Promises of Wage and Benefit Increases

As noted, the decertification election was first scheduled for November 21. On October 23 the Employer posted a notice to employees stating that it was establishing a box in which employees could place any questions that they might have about the election. The notice concludes:

> Please ask questions which call for a factual answer and not a promise from the Company. As you may or may not know, the NLRB prohibits the Company from making any promises before a decertification vote which might unfairly influence your decision. To do so could result in a Company election victory being set aside.

Thereafter, the Employer posted several other notices that stated answers to questions that the employees had purportedly asked. The Employer also gave several speeches to the employees during the pre-election period. The Union's Objections 2, 3 and 8 contend that in both the postings and the speeches the Employer impliedly promised the employees improvements in benefits if they rejected the Union. The Objections further contend that, through an employee who was its agent under Section 2(13) of the Act, the Employer orally made such objectionable promises.[15]

The unit employees do not have a 401(k) plan. In a posting dated November 5, the Employer told the employees that YKK(USA) employees have both a pension plan and a 401(k) plan, and the posting further states:

> YKK(USA) employees have traditionally received a bonus payment in December. The amount of bonus has been based on seniority with the Company. For example, an employee with 15 years [of] seniority has typically received over $1,000. Of course, there is no guarantee that the bonus plan would continue at YKK, and we are not promising such a plan for Lawrenceburg employees.

Theretofore, the unit employees had received only turkeys at Christmas.

In six separate postings dated November 11, the Employer stated (again, in the form of answers to questions) that it would not withdraw any of several specified benefits that the unit employees had previously enjoyed if they rejected the Union. One of those postings included: "We cannot make any promises. However, we do not intend to penalize you for voting the Union out."

As I have discussed above, the Employer, by Dedman and Wiley, made a slide presentation to the employees on November 11 and 12 comparing the benefits (other than wages) of the YKK(USA) employees in Macon with those of the unit employees; the presentation further compared the wages and benefits of the Centerville employees with those of the unit employees. I have concluded above that the Employer did not violate Section 8(a)(5) by failing to furnish the Union information about the wages or benefits of the YKK(USA) employees, but I must further address the Union's contention that the presentation carried an implicit promise to the employees that, if they decertified the Union, the Employer would grant them benefits similar to those enjoyed by the YKK(USA) employees.

Dedman began the November 11-12 presentation by commenting that the Employer's machine shop employees, who had been separately represented by the International Association of Machinists, had expressed a disinterest in continuing representation. Dedman stated: "If the [Machinists] union accepts the will of the majority, we will move forward, without bargaining, and make adjustments in wages and benefits for them as soon as legally possible. As a company, we feel very strongly that the machine shop group has done what is in their long term best interest and in the best interest of the Company." Thereafter Dedman showed slides that compared the labor grades and wages of the unit employees with those of the unrepresented Centerville employees. (Generally, the slides show that the Centerville plant

[15] These objections further allege that, at least, the Employer told the employees that they would have nothing to lose by decertifying the Union. The evidence shows that the Employer did this repeatedly. The Board has held, however, that promises to maintain the status quo are neither objectionable nor violative of Section 8(a)(1). See *Weather Shield Mfg.*, 292 NLRB 1 (1988), as that case cites *Crown Chevrolet Co.*, 255 NLRB 826, fn. 3 (1981), and *El Cid*, 222 NLRB 1315 (1976).

has one more labor grade and that wages in Centerville are slightly higher.) Further slides showed that, from 1991 through 1997, the Centerville employees had received greater wage increases than the unit employees had received, in both percentage and dollar terms. Dedman concluded: "With regard to annual wage increases, this chart shows that the Centerville employees have received greater annual wage increases than those increases [that have been received by the employees who are represented] by UNITE here in Lawrenceburg."

The next slide that Dedman showed to the unit employees was of a table entitled "Benefit Plan Comparison for Hourly Employees." The narration describes it as an "overall" benefit comparison for the employees at YKK(USA), Lawrenceburg and Centerville. The rows of the first of four columns lists 20 benefits: medical insurance, pension plan, short term disability, life insurance, employee educational assistance, loans for education, credit union, holiday/vacation schedule, length of service awards, prescription drug coverage, dental insurance, 401(k) retirement plan, a "Healthy Baby and Moms" program, managed behavioral care, vision care, dependents' scholarship program, flexible term life insurance, universal life insurance, Christmas monetary bonus, and Christmas ham or turkey. In the three remaining columns, the corresponding rows indicate (as "Yes" or "No") whether YKK(USA), Lawrenceburg or Centerville employees receive each of those benefits. The table indicates that YKK(USA) employees receive all twenty benefits; the Lawrenceburg employees receive all but dental insurance, 401(k) retirement plan, the "Healthy Baby and Moms" program, managed behavioral care, vision care, dependents' scholarship program, flexible term life insurance, universal life insurance, and a Christmas monetary bonus. (The benefits at Centerville were shown to be the same as at Lawrenceburg, except that the Centerville employees do not receive prescription drug coverage.)

After this display, Dedman's narration that accompanied the slide presentation continued: "As you can see, YKK hourly employees enjoy several more significant benefits. These include a 401(k) plan, dental insurance, short-term disability, vision care, a better life insurance program and an end-of-the-year bonus program. Let's look at some of these benefits in detail." The slides that followed showed such factors as Company contributions to the respective plans, dollar amounts of insurance coverage, and deductibles on insurance coverage. In each case, the unrepresented employees were faring better than the unit employees.

After Dedman's slide presentation, Wiley began a speech, the relevant part of which was:

> Most of you do not know that YKK's largest facility in Macon, Georgia, was unionized from 1978 to 1984. After two contract negotiations, the employees decided that they had had enough and voted the union out by a 2 to 1 margin. Since then, Macon has more than doubled in size and now has approximately 1100 employees working there.

Wiley concluded the presentation by stating that if the employees voted the Union out they could change their minds in a year, but if they did not, and a contract was signed, it could be three or more years before they had another chance.

The next speeches that are in issue occurred on February 4 and 5. As noted above, the election had been scheduled for November 21, but blocking charges caused it to be delayed until February 20. As further noted above, on February 2, Dalzell (manager of the Employer's engineering department) read a statement to the machine shop employees stating, *inter alia*, that they and the Centerville employees would be receiving 4% wage increases, increases in life insurance benefits, a 401(k) plan, and an employee handbook. In February 4-5 speeches to the bargaining unit employees, Dedman stated, *inter alia*:

> In November, we received evidence that a majority of the machinists no longer wished to be represented by their union. We, as well as many of the machine shop employees, communicated that

> information to the Machinists' Union on several occasions. The [Machinists'] Union could have filed an unfair labor practice charge to contest it, but [it] chose not to do it. Consequently, when the machinists' contract expired, those employees, for the first time in over 40 years, were no longer represented by a union. Because negotiations were no longer necessary, we went forward and, as we did in Centerville, announced adjustments to their wages and benefits. This announcement was made [to the machine shop employees] on Monday, February 2.

(Dedman's speech did not include a detail of what the increases in benefits for the machine shop employees were.) In his speech, Dedman then went on to discuss the negotiations that had been conducted between the Employer and the Union, and he described a stalemate that had resulted. Dedman then states in his February 4-5 speech:

> If you vote to keep the Union, then we will return to the bargaining table and resume bargaining. I cannot predict how long it will take or whether we will reach agreement, but we will continue to meet our legal obligations and bargain in good faith.
>
> On the other hand, if you vote the Union out, the Company will be in a position to deal with you directly without the need for negotiations. I believe the Company will be fair with you. However, we cannot promise you anything. I know people are asking if they will receive the same wage and benefit increase as the machine shop employees or the Centerville employees received. At this point, we cannot guarantee you anything and we simply cannot make promises.

As noted, the unit employees did not have a 401(k) plan. In a posting dated February 13 the Employer explained generally what 401(k) plans were, and it concluded: "As you know, we cannot promise anything regarding a 401(k) to employees represented by UNITE, regardless of the outcome of the election."

Conclusions on alleged promises

Other than that which may be implicit in the above-quoted speeches and documents, the Union does not allege that any admitted supervisor within Section 2(11) of the Act, or admitted agent within Section 2(13), promised the unit employees any improvements in wages or benefits if the Union did not receive a majority vote in the decertification election. The Union does contend, however, that one Roger Lyons was an agent of the Employer and that Lyons made such objectionable promises to the unit employees. The Employer denies that Lyons was its agent, and it claims no knowledge of campaign activities in which Lyons may have engaged.

As stated by the Board in *Waterbed World*, 286 NLRB 425, 426-427 (1987), the test of agency is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." Lyons, who did not testify, is a color-tester in the Employer's laboratory. Union steward Bruner testified that Lyons substituted for an admitted supervisor when that supervisor was sometimes absent, but there is no evidence as to how often that occurred or what authorities that Lyons may have possessed when he did act as a substitute. Lyons did attend some meetings that admitted supervisors attended, but the probative evidence is that he did so only in a technical-advisory capacity. Lyons did campaign actively against the Union, and in doing so he told employees that they would receive more benefits if the Union was rejected. There is, however, no evidence that the Employer sponsored or condoned such activity, and there is no evidence that the Employer did anything to suggest to employees that Lyons was acting on its behalf. I therefore shall recommend that the objections be overruled to the extent that they seek to charge the Employer with responsibility for the conduct of Lyons.

Nor do I find objectionable conduct in the benefit comparisons that the Employer communicated to its employees. In its quoted notices and speeches, the Employer made several comparisons between the

benefits that had been received by the unit employees and the benefits that had been received by its unrepresented employees, almost all to the disadvantage of the former.[16] The Employer further emphasized that its employees in the machine shop and the employees of YKK(USA) had achieved their higher level of benefits after decertifying their respective collective-bargaining representatives. Nevertheless, with the exception of Dedman's February 4-5 statements that "I believe the Company will be fair with you," all of the Employer's questioned campaign statements were representations of what had happened to non-unit employees in the past; they were not representations of what would, or even could, happen to the unit employees in the future. The Union does not contest the accuracy of any of those representations, and it offers no argument for a holding that an employer's statement that it would be "fair" constitutes some form of a promise.

In *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979), the Board did find an implied promise of benefit to employees who were scheduled for a decertification election where the employer prepared, and submitted to each of its represented employees, benefit comparisons in the form of individualized projections of how much better each would fare under a retirement plan that its unrepresented employees then enjoyed. The Board concluded that, because of the obvious extensive effort involved in those individually tailored and detailed projections, employees would logically conclude that the employer was more than just "comparing benefits." In *Viacom Cablevision*, 267 NLRB 1141 (1983), however, the Board distinguished *Etna* and found no implicit promise where the employer presented to its employees a general (*i.e.*, not individualized) comparison that showed that its employees who had decertified their union had historically received higher wages than some of the employer's represented employees. As the Board stated:

> A comparison of wages is not *per se* objectionable; the question is, was there a promise, either express or implied from the surrounding circumstances, that wages would be adjusted if the union were voted out.

The Board found no such promises because: (1) the comparisons were offered to the employees in response to their requests for information, (2) the employer did no more than truthfully inform the employees of wages that had been enjoyed by its unrepresented employees, (3) the employer "repeatedly" made verbal disclaimers of promises in its meetings with employees, and (4) the wage comparison was only one of many topics covered in the employer's letters to employees and meetings and conversations with them.

In concluding in *Viacom* that wage comparisons are not *per se* objectionable, the Board cited *Dow Chemical Co*., 250 NLRB 756 (1980), enforcement denied on other grounds, 660 F.2d 637 (5th Cor. 1981). In *Dow*, the General Counsel had made a contention that such a comparison violated Section 8(a)(1). The administrative law judge, at 250 NLRB 760, stated:

> I do not agree. Section 8(c) of the Act is completely devoid of meaning unless it permits an employer to clearly portray its practices with respect to its unrepresented employees so that they could decide whether they wanted to secure unrepresented status.

Viacom's holding that honest benefit comparisons are not *per se* objectionable has been followed in subsequent Board cases.

In *Duo-Fast Corp.*, 278 NLRB 52 (1986), the Board followed *Viacom* and found unobjectionable an employer's issuance of a leaflet containing an "honest comparison" of the insurance benefits of its represented and unrepresented employees. In that case the comparison was not tendered in response to employees' questions, as in *Viacom*, but the leaflet did make an explicit disclaimer of promises. That

[16] The sole exception was that the Centerville employees did not receive the drug prescription benefit.

disclaimer was also repeated in some, but not all, of the employer's subsequent campaign meetings where some other benefits were discussed. Other cases that have followed *Viacom* include: *Golden Poultry Co.*, 271 NLRB 925 (1984); *KCRA-TV*, 271 NLRB 1288 (1984); *Best Western Executive Inn*, 272 NLRB 1315 (1984); *International Paper Co.*, 273 NLRB 615 (1984); *BASF Wyandotte Corp.*, 276 NLRB 1576 (1985), and *Weather Shield Mfg. Co.*, 292 NLRB 1 (1988). In *Coca-Cola Bottling Co. of Dubuque*, 318 NLRB 814 (1995), the Board distinguished *Viacom*, and found an objectionable implied promise where the employer submitted to its employees individual projections of how they would benefit from being unrepresented, without any requests for such by the employees, and the employer "did not offer any type of disclaimer to counter the clear impression of a promise of benefit."

On brief, the Union does not mention *Viacom* (or even the case that distinguishes it), but it does cite *Selkirk Metalbestos*, 321 NLRB 44 (1996), enforcement denied 116 F.3d 782 (5th Cir. 1997). In *Selkirk*, the employees who were approaching a decertification election did not have a 401(k) plan. Shortly before the election, the employer commented to its bargaining unit employees that all of its unrepresented employees did have 401(k) plans. Without express consideration of *Viacom* or any of the cases that followed it, the administrative law judge concluded that the employer's comment "constituted an implied promise of benefits and ... thereby the respondent engaged in conduct violative of Section 8(a)(1)." The Board in *Selkirk* affirmed the administrative law judge's decision, but it did so without discussion of this point. The administrative law judge's decision in *Selkirk* is in conflict with *Viacom* and its progeny which hold that wage comparisons are not *per se* objectionable. In *Viacom*, the Board was careful in stating its reasons for distinguishing *Etna*. In the cases following *Viacom*, the Board has never questioned its reasoning. I therefore cannot accept the Board's affirming, without comment, the administrative law judge's decision in *Selkirk* as a tacit overruling of the *Etna-Viacom* line of cases. That is, I shall follow *Viacom* as the law.

The benefit comparisons made by the Employer in this case were quite detailed, and they were often premised on what good things had happened to other of its employees after they had rejected their collective-bargaining representatives. Unlike the facts in *Etna Equipment* and *Coca-Cola Bottling Co. of Dubuque*, however, the benefit comparisons were not individualized projections of how well the unit employees could do *in the future* without representation; the comparisons were honest portrayals of what had happened *in the past*. Employees who are presented with individualized projections that are premised on a future environment of non-representation would reasonably conclude that their employer is telling them that they will do better without representation, and to what specific degree. This was the evil addressed by the Board in *Etna Equipment* and *Coca-Cola Bottling Co. of Dubuque*, but that evil is not present here; again, the Employer referred only to what had happened in the past. Moreover, although the Employer did not make disclaimers of promises that could be characterized as repeated, it did state in its original communication of October 13, and in many of those that followed,[17] that it was not promising the employees anything. Finally, the Employer presented at least some of its comparisons as answers to employees' questions, and the comparisons were just part of the Employer's over-all presentation. Therefore, this case has all of the essential factors cited by the Board in *Viacom* for a finding that objectionable implicit promises had not been made.

I shall therefore recommend dismissal of the objections that allege that the Employer made implied promises of benefit in order to influence the election.

[17] In its posting of November 5, the Employer stated, "... we are not promising such." A posting of November 11, stated, "We cannot make any promises." In his February 4-5 speech Dedman told the employees ".. we cannot promise you anything" and " ... we simply cannot make promises." The posting of February 13 concluded: "As you know, we cannot promise anything regarding a 401(k) to employees represented by UNITE, regardless of the outcome of the election."

G. Threats to Close the Plant or to Refuse to Bargain

Objections 6, 7 and 9 allege that during the critical period the Employer threatened the unit employees that it would close or move the plant, or that it would refuse to bargain with the Union, if the employees did not decertify the Union at the election.

In support of these objections, the Union cites certain postings and letters that the Employer issued, and it cites the legends of certain badges that the Employer distributed to non-unit personnel. All of those communications stated that the Employer's success in the election, and the employees' jobs, depended on its remaining competitive in the market place. In cases such as *House of Raeford Farms, Inc.,* 308 NLRB 568, 592-93, (1992), and *Golden Fan Inn,* 281 NLRB 226, 227 (1986), the Board has held that such appeals are not objectionable, and the Union cites no contrary authority. Finally, the Union argues that certain undenied statements by color-tester Lyons conveyed a threat to close the plant or, at least, to refuse to bargain with the Union. As I have held above, however, Lyons was neither a supervisor nor an agent of the Employer and the Union advances no reason for charging the Employer with responsibility for Lyons' conduct that is arguably objectionable.

I shall therefore recommend that these objections be overruled.

H. Discriminatory Posting Rules

The Union's Objection 4 is that:

> On and prior to February 19, 1998, the Employer discriminatorily applied its rules regarding the posting of notices by employees in the plant by, among other things, allowing employees opposed to the Union to post notices or signs but prohibiting employees who supported the Union from posting notices or signs and also removing such posters or signs. Furthermore, the Employer posted notices or signs in the plant rather than on its bulletin board but did not allow the Union to do so. Said conduct continued through the election.

Earl Bruner (again, the Union's chief steward) testified that beginning in late October he saw several anti-union signs posted at the plant. One of the signs was a two-foot by two-foot poster that said "Untie UNITE." The signs were posted on a machine near the work station of anti-union employee Tammy Parks. That work station was near an aisle that employees use to get to the lunchroom, and the sign could easily be seen by any employee who was going on break. Bruner further testified that the "Untie UNITE" poster remained at Parks' work station until February 19, the day before the decertification election. Bruner further testified that he saw Parks post another anti-union sign near the women's rest room; in essence, the sign discouraged employees from buying pro-union T-shirts. After a few hours, Bruner tore the T-shirts sign down. Bruner further testified that he saw an identical sign posted on the employees' personal bulletin board for several days. Bruner further testified that about a week before the election someone (who, in fact, was Parks) posted letter-paper-size leaflets on glass windows that are in a wall that separates the lunchroom from the production area. The leaflet mentioned certain economic perils of striking, and it urged the employees to vote against the Union. Bruner testified that these strike-peril leaflets also remained posted until February 19 when he saw Bates take them down and replace them with Company-generated literature that also urged the employees to vote against the Union.

Bruner further testified that about 9:40 a.m. on February 19, when he went on break, he saw a large sign that was posted on a "roll-up door" that was in a main aisle near the painting room. The sign was about five or six feet from the floor; it was made of cardboard; it was about two-and-one-half-feet tall by six-feet wide; in red, spray-painted lettering, it said: "Vote-No." Bruner further testified that during that morning he also saw in the paint room several "Vote-No" leaflets that were on letter-paper-size paper, and he saw other anti-union leaflets that were posted in the general area. After the break on that day,

Bruner met with pro-union employees Kelley Sea and Carrie Sea and made up several "Vote-Yes" posters that were made of cardboard; each of the posters was about four feet square. Bruner placed one of the signs near the lunchroom and one near his work station.

Bruner further testified that, "a few minutes after 10:00" on February 19, production superintendent Cheryll McDaniel approached him and said that she was removing the large "Vote-Yes" sign that was in his work area. Bruner asked McDaniel if she was also going to remove the various "Vote-No" signs about the plant. According to Bruner, McDaniel replied "that that was Company property; they would decide what went up and what stayed." At the time, McDaniel removed the large "Vote-Yes" sign that Bruner had posted in his work area, and she removed all other "Vote-Yes" signs that were in that area. McDaniel did not, further according to Bruner, remove the large"Vote-No" sign that had been put up that morning; nor did she remove any other of the "Vote-No" signs that were then posted. Around 2:00 p.m. on February 19, McDaniel returned to Bruner's work area. She told Bruner that she had discussed the matter with someone, and that she was going to take down the large "Vote-No" sign that was on the roll-up door. Bruner was not asked if McDaniel said anything about, or removed, any of the other anti-union signs that were posted in the plant.

Gayle William Smith is the president of the Local Union. Smith testified that he saw the "Untie UNITE" sign that Parks had posted on a machine in her work area. Smith testified that the sign was posted "quite a while" before the election and it remained posted through the hours that the election was conducted. Smith further testified that the "Untie UNITE" sign was about 11 inches by 12 inches. Smith further testified to seeing other anti-union leaflets posted at the plant, but he acknowledged that they were taken down on February 19.

Kelly Sea also testified to making "Vote-Yes" posters during the morning of February 19. Sea testified that McDaniel took down the ones he created by 10:00 a.m. The large "Vote-No" poster was left up until after 12:30 p.m. when someone whom Sea did not see took it down.

Parks was called as a witness by the Union. Parks testified that she posted two "Untie UNITE" signs in her work area, one on a machine that she operated and one on a cabinet nearby. Parks testified that the "Untie UNITE" sign was on letter-size paper. Parks' supervisor, Pam Powell, told her to remove the sign from her machine several days before the election and Powell told her to remove the sign on the cabinet two days before the election. Parks denied that she had placed the signs in her area so that it would be easy for passers-by to see them. Parks further testified that she created the strike-peril flyer, that she posted two copies in the lunchroom, and that they stayed there until two days before the election. Parks further testified that she created the leaflet about paying for Union T-shirts, and she testified that she placed such leaflets on the lunchroom tables, but she denied posting them near the women's rest room, as Bruner testified. On examination by the Employer, Parks testified that she took down the strike-peril leaflet from the lunchroom walls (or windows) because her supervisor (Powell) told the employees that "everything" had to be taken down two days before the election.

McDaniel was called by the Employer. McDaniel testified that during the weeks before the election she saw letter-paper-size flyers posted about the plant that had to do with the campaign, but she denied recollection of what any of them said. McDaniel testified that on February 18 she saw a large "Vote-Yes" sign posted near Bruner's work station. McDaniel was asked and she testified:

> Q. When you saw this four by four sign that said vote yes, what did you do?
> A. Well, I felt it was inappropriate and I went over to [Bruner] and told him that I was going to take it away and told him that if he wanted to have that type of campaign information as a hat or a button or a tee-shirt he was more than welcome to do that but I'd appreciate it if they wouldn't put those large signs up on the Company property. ...
> Q. Did Mr. Bruner respond to your comment?

A. Well, he said, "What about the others?" And I said, "Well I don't know about any others." And that particular day I hadn't been out on the floor much. So, I wasn't aware but I went out within the next twenty minutes probably and found some more of the vote yes signs and found some vote no signs, so I took them all down.

Q. Did you have any other conversation with Mr. Bruner after you took the sign down?

A. I don't recall.

McDaniel testified that, as well as the large "Vote-Yes" sign that was near Bruner, she then took down the large "Vote-No" sign that Bruner described in his testimony and that she then took down some other anti-union literature that had been posted, as well. McDaniel testified that she had not seen the large "Vote-No" sign before she saw Bruner's large "Vote-Yes" sign.

On cross-examination McDaniel testified that she spoke to Bruner about his large "Vote-Yes" sign about the time that Bruner was scheduled to go to lunch, 11:40 a.m. McDaniel flatly denied speaking to Bruner about 10:00 that morning. McDaniel was asked and she testified:

Q. Let me ask if you -- after this event took place, after you talked to Mr. Bruner, did you then consult with Mr. Dedman or anyone else with the company about the signs that were around?

A. I talked to my direct supervisor about it. Yes.

Q. All right. Who is that?

A. Jerry Dedman, plant manager.

Q. And, after consulting with him, did you and Mr. Dedman or did you make any decision about how to handle the signs?

A. I had already taken the signs down.

Q. You did that on your own?

A. Yes.

Q. Then you consulted with Mr. Jerry Dedman?

A. I informed Jerry Dedman that I had taken the signs down.

Q. What did he say?

A. I really don't recall exactly what was said.

Jerry Dedman did not testify.

Bates was called by the Employer. He acknowledged that up until the last days before the election, employees posted both pro-union and anti-union flyers about the plant. He testified that he told some supervisors that there should be no employee postings, but he further testified that he did not know if any of the supervisors followed his suggestion. When asked on direct examination if he told any supervisors to remove postings, Bates replied:

One specifically was Cheryl McDaniel [who] had called me and asked about postings in the plant, about what was allowable and I told her that we weren't to really allow anything, either side, no matter how people felt, one way or the other, that the materials weren't supposed to be posted. ...

It happened to be the day that she was calling in regards to the signs that Kelly Sea had made and I didn't know at the time who specifically helped him make them but she mentioned to me that there were some signs made by Kelly. They were quite large. They were made on the cardboard box tops on Company material and she asked about, should she take those down, should she confiscate them, that type of thing. She said that there were some other signs as well. I said all signs should be taken down. Those kinds of things [are] kind of getting out of hand, so to speak.

On cross-examination, Bates testified that he became concerned when the large signs appeared. As Bates put it: "As we got near the end of the campaign, again, it was brought to my attention the four by four signs and indirectly I was told of that one and also the one that was on the roll up door."

Conclusions on Posting Allegations

There is no evidence that, before February 18 or 19, when McDaniel confronted Bruner, supervision did anything to prevent pro-union postings. I credit the testimonies of Bruner and Sea that they created the large "Vote-Yes" signs on February 19, and that they did so after noticing the large "Vote-No" sign on the roll-up door. I further credit Bruner's testimony about his exchanges with McDaniel, including the timing of those exchanges. McDaniel testified that she took down signs, all signs, when she saw one of the large "Vote-Yes" signs that Bruner had posted in his work area. McDaniel further testified that she did so on her "own," that she did not consult with anyone beforehand, and that she only told Jerry Dedman what she had done thereafter. Bates, however, testified that when McDaniel had spotted the "four by four signs" that Sea had created, and the large sign on the roll-up door, she called him and asked "about what was allowable ... should she confiscate them." Bates testified that he told her to confiscate all signs. Bates would not have so testified if it was not true, and McDaniel's testimony that she took down all postings that she saw, on her own, was clearly false.

I find that early on February 19, McDaniel removed the "Vote-Yes" signs that had been posted in the plant, including the large "Vote-Yes" signs that some employees had constructed. After Bruner protested that the "Vote-No" signs were remaining, McDaniel called Bates who told her to take down all signs. Then, nearer noon, McDaniel went back to Bruner and told him that that was what she was going to do, and she did. It was at that point, and not before, that McDaniel removed all anti-union postings, including the large "Vote-No" sign that was on the roll-up door.

I credit Parks' testimony that the signs that she posted in her work area were only letter-paper size. Even Smith, who was evasive on other points, corroborated this testimony. I credit Smith's and Bruner's testimonies, however, that the signs in Parks' work area were plainly visible to employees who walked the main aisle. Nevertheless, the Employer removed all signs about mid-day on February 19. The issue is whether an employer commits objectionable conduct if it allows anti-union signs (large or otherwise) to remain posted only about two hours more than pro-union signs. The Union cites no authority for the proposition, and I cannot envision how such conduct would have tended to influence any employee's free choice at the election. I shall therefore recommend overruling of the Union's Objection 4.

I. Oral No-solicitation Rule

To begin his examination of Bates about campaign postings in the plant, the Employer's counsel asked Bates if there had been pro-union and anti-union employee postings "during this period of time immediately prior to the vote." Bates replied that there were. Then Counsel next asked Bates, and Bates testified:

> Q. Did the Company have a policy regarding the posting of those materials?
>
> A. Well, we had talked to each of the employees in a meeting and mentioned to them that they weren't really to discuss Union matters, whether they were pro Company or pro Union, in the work place during work hours. That that was to be restricted to non-work times and in non-work areas which would include the break room or after hours.
>
> Periodically there were some postings. We had mentioned to the employees that they weren't to do that and on occasion there were people who were asked to take them down.

That is, before answering Counsel's question, Bates volunteered that at least some employees were told by supervision that they should not discuss matters relating to the Union (pro or con) during working time or in working areas.

On cross-examination Bates acknowledged that employees were allowed to talk about any other matters while they worked. Bates further testified that he believed that he had mentioned during one of the meetings that he had held with employees that they were not to discuss Union-related matters while they were working. Bates was further asked on cross-examination, and he testified:

> Q. Okay. Did you specifically at any of those meetings make a point to tell employees that they are not to talk about the Union during work times?
>
> A. I did in some supervisory meetings. Yes, sir. I did to some specific Union employees also. Yes, sir. ...
>
> Q. You say you spoke to Union employees about talking about the Union on work time. Do you remember which employees those were?
>
> A. Specifically it had been reported to me that Kelly Sea was doing that and I just went to Kelly and said, you know, someone had told me this. I'm not trying to stir anything up but on this particular incident I said somebody has mentioned that you were talking about it and I just ask you to be aware that you can't do that in work areas or on work time. That it is restricted to the break room or after hours.
>
> Q. And, anyone else that you told that to?
>
> A. I can't specifically recall anybody else that I would have told that to. It seems like I did tell some others that but I do not recall who it was. Again, I only did it when it was brought to my attention.
>
> Q. Is that an accurate statement of company policy?
>
> A. If it's brought to my attention that somebody is doing that, yes I would go talk to them about that. Yes, sir. ...

Then, on redirect examination, Bates was asked and he testified:

> Q. With regard to your conversations with -- your conversation with Kelly Sea regarding his solicitation, did you have conversations with any other employees? ...
>
> THE WITNESS: There were times when we discussed [that] with supervisors. There were times when I walked out on the floor and mentioned to people, you know, to remember the rules about talking about only things that weren't related to Union matters. You know, I believe that I can recall even talking with Ms. Parks on occasion -- Ms. Tammy Parks. I discussed it several times with [supervisor] Pam Powell.

Finally, on re-cross examination Bates was asked and he testified:

> Q. Mr. Bates, in telling employees what the policy is about not discussing the Union on work time or work areas I think you said it was, is that right?
>
> A. Yes, sir.
>
> Q. Okay. What about discussions in work time or work areas about personal matters? For example ball games, family, weather, is that allowed?
>
> A. I would say that yes it is. We request employees to do their best to stay in their work area but we understand that a large portion of our machines are somewhat automated which would give them the time to roam the floor a little bit. So, we didn't restrict that. We've at times asked people to try and stay in your work area a little bit more when --
>
> Q. As long as it's reasonable they're allowed to talk about personal matters on work time?
>
> A. Within a reasonable amount of time. Yes, sir.

Q. They're not allowed to talk about Union matters during work time at all?
A. Well, it's my understanding that that's not allowable. No, sir.
Q. And, that's the policy you communicated to employees?
A. Yes, sir.
Q. And, the same thing applies to work areas? They can't talk about the Union in work areas?
A. That's my understanding. Yes, sir. And, that's what we communicated.

At the conclusion of Bates' testimony the Union moved to amend the objections to include an allegation that the Employer had interfered with the election by promulgating and maintaining during the critical period an unlawful no-solicitation rule.[18] The Union claimed as a basis for its motion that Bates' testimony was newly discovered evidence. The Employer objected to the motion on the ground that the evidence could have been discovered with a reasonable amount of effort by the Union. I deferred ruling on the motion pending the filing of briefs.

In *American Safety Equipment Corporation*, 234 NLRB 501 (1978), the Board held that, when a Board's regional director is conducting an investigation of timely filed objections, it is within his or her discretion to determine the scope of the investigation, but "if he receives or discovers evidence during the investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election." Following *American Safety Equipment*, the Board in *Burns International Security Services, Inc.*, 256 NLRB 950 (1981), further specified what evidence a regional director may consider even though it did not timely come to his or her attention:

> The objecting party may bring to the regional director's attention any newly discovered evidence that bears directly on the timely objections, for such evidence is more apt to aid than encumber him. The interest in insuring the employees were not coerced also warrants the regional director's consideration of unrelated misconduct, unknown to the objecting party at the time the objections were filed, the existence of which comes to its attention while the regional director is conducting his investigation. However, since consideration of such matters might enlarge the scope and delay the conclusion of the investigation, they normally should be considered only upon presentation of clear and convincing proof that they are not only newly discovered, but also previously unavailable. We deem this limitation necessary in order to discourage both the piecemeal submission of evidence and the leisurely continuation of private investigations while the investigation should be under the control of the regional director.3/
>
> 3/ We expect that previously unavailable evidence, when truly encountered, usually will have come to the objecting party's attention unsolicited, not through a continuation of its own investigation.

In *Burns*, the objecting party had submitted evidence, some of which was related to the timely filed objections and some of which was not. The Board found that the objecting party had made only a "bare assertion" that the submitted evidence was newly discovered, rather than making a probative demonstration of that claim.

Citing *Burns*, the Employer argues that the Board should not consider evidence of its promulgation of a no-solicitation rule because the Union did not make any showing, much less a "clear and convincing" showing, that evidence thereof was previously unavailable to it. The Employer argues that, in fact, the evidence of its no-solicitation rule was available to the Union, and it could have discovered the rule's existence if only it had asked pro-union employees such as Kelly Sea whether he had been told by Bates (or other supervisors) that he could not discuss Union-related matters while working although he was free discuss other matters.

[18] The transcript, page 442, line 20, is corrected to change "promulgation oral maintenance" to "promulgation and maintenance."

Bates' volunteering at trial that he had prohibited discussions about the Union, but that he had also permitted employee discussions of other topics, clearly "[came] to the objecting party's attention unsolicited, not through a continuation of its own investigation," within footnote 3 of *Burns*. Therefore, Bates' testimony is evidence that was "newly discovered," and the Board must consider it unless the Union was also required to show, under *Burns*, that it was "previously unavailable."

The Board in *Burns* made clear that the paramount consideration in conducting investigations of objections is "insuring [that] the employees were not coerced." Accordingly, the Board in *Burns* qualified its guidelines by stating that "normally" the objecting party should be required to present proof that the after-acquired evidence was previously unavailable. A case in which a party volunteers sworn testimony that indicates that it coerced employees is not what "normally" happens. If an affirmative showing of prior unavailability of evidence were required of an objecting party after the other party makes such an admission at trial, hearings undoubtedly would have to be continued to give the objecting party time to investigate and prepare evidence of why it could not have discovered the admitted matter before trial. (For example, in this case I would have been hard pressed to deny a motion for continuance by the Union to give it time to contact Kelly Sea and other employees to determine why they had not told the Union about Bates' instructions.) Such a requirement would, of course, penalize the victim. Also, the evil that the Board sought to prevent in *Burns* is the piecemeal submission of evidence, the consideration of which would unduly protract the investigatory process. Consideration of admissions that are made at trial would not, of course, unduly protract the investigatory process, but recessing a trial so that an objecting party can gather and prepare evidence of prior unavailability of other evidence certainly would. Moreover, in *Pincus Elevator & Electric Co.*, 308 NLRB 684 (1992), the Board in an unfair labor practice proceeding found it to be error for the administrative law judge to have denied a motion to amend a complaint after the respondent had, itself, introduced evidence that tended to show that it had engaged in unlawful interrogations of employees. That is, having introduced evidence of its own wrong-doing, a party is ill-positioned to complain if the Board considers such evidence. I see no reason that the logic of *Pincus Elevator* should not apply to representation cases such as this one. Finally, such evidence must be considered if the Board is to fulfill its responsibility of "insuring that the employees were not coerced." I therefore grant the Union's motion to amend its Objections to include the allegation that, during the critical period, the Employer promulgated and maintained an unlawful no-solicitation rule.

The Employer next contends that there is no evidence that it promulgated or maintained its no-solicitation rule during the critical period. When the Employer's counsel began the line of questioning that resulted in Bates' admission of the existence of the no-solicitation rule, he referred Bates to "this period of time immediately prior to the vote." Clearly, Bates' following testimony referred to what had happened within the critical period. Moreover, after Bates' admission, there is no question that the no-solicitation rule had existed, at least at some point in time. In this circumstance, the burden is not upon the Union to show that the no-solicitation rule existed within the critical period; the burden is upon the Employer to show that it existed only outside the critical period. In *St. Mary's Infant Home*, 258 NLRB 1025 (1981), the Board held that, in an unfair labor practice case, a defense that is premised on the limitations period of Section 10(b) is an affirmative one, and, therefore, the burden of proving that a given event occurred outside that limitations period rests upon the party who asserts that defense. In *Comcast Cablevision*, 313 NLRB 220, at 224 (1993), the Board held that, in cases involving objections to conduct affecting the results of Board elections, the rationale of *St. Mary's* also applies, and the burden of proof rests on a party who claims that given conduct occurred outside the critical period. The Employer has made no attempt to show that the no-solicitation rule existed only outside the critical period in this case.

Finally, the Employer contends that the no-solicitation rule that Bates revealed at trial was not objectionable because the contract provides:

> 4.1(d) — The Union agrees that there shall be no solicitation of employees for union membership or other union activities on the Company's time or during the employees' working hours. Employees violating this provision will be subject to a warning by the Company on the first offense and discharge on the second offense.

The Employer further argues that Bates admitted only that he reminded Kelly Sea of this contractual provision. Bates did not so testify. Moreover, Bates admitted that he also announced the no-solicitation rule to anti-union employee Parks; there is no argument that Bates' instruction to Parks was protected by the above-quoted contractual provision.

To the extent that the contractual provision could be said to waive employee rights to engage in otherwise protected communications, it is a nullity. In *NLRB v. Magnavox Co.*, 315 U.S. 322 (1974), the Supreme Court held that a no-distribution rule that was incorporated into a collective-bargaining agreement could not waive employees' statutory rights to distribute literature in non-working areas. The Court reasoned, at 325: "The place of work is a place uniquely appropriate for the dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on non-working time, banning of that solicitation might seriously dilute Section 7 rights." In this case, the union-related discussions that were prohibited by Bates' no-solicitation rule occurred on working time, but they were protected because the Employer allowed other types of communications during working time. Under *NLRB v. Magnavox Co.*, the contract cannot be employed in order to interfere with these protected communications.

Having rejected all of the Employer's objections to consideration of Bates' admissions, I find that the Employer promulgated and maintained during the critical period an oral rule that employees could not discuss Union-related matters during working times in work areas, although the Employer then did allow employee discussions of other matters during working times in work areas. I conclude that, by its promulgation and maintenance of a discriminatory no-solicitation rule during the critical period, the Employer interfered with the free choice of its employees in the Board election. Accordingly, I conclude that the February 20 decertification election should be set aside on that basis.

J. Grant of a Wage Increase to Stewart

The Union's Objection 12 is that, during the critical period, the Employer granted unit employee Steve Stewart a wage increase in order to discourage employees from voting for the Union in the February 20 decertification election.[19] Stewart is a 25-year employee who had served as the Union's vice president and a member of its negotiating committee. At the decertification election, however, he served as the Employer's observer.

In early 1994, the Employer created the classification of "set-up man" in its small orders department, and the Employer then posted two jobs for that classification. Stewart and one Larry Peak successfully bid on the two jobs, and they were reclassified on February 7, 1994. The pay rates for Stewart's former job and the set-up job were the same. Peak's former job, however, had paid $.20 per hour more than the set-up job. As a result, the Employer cut Peak's wage rate by $.20 per hour. Stewart and Peak thereafter received the same wage rate while working in the set-up classification. At some point later, however,

[19] On its face, the objection also alleges that, in granting the wage increase to Stewart, the Employer "... dealt directly with this employee, thus bypassing the collective-bargaining representative." Under the expired contract, however, the Employer had a right to increase wages for merit, and the Union does not argue the direct-dealing portion of the objection on brief.

Peak left the set-up job, and he was replaced by one Larry Hudson whom Stewart was assigned to train. At some point after that, Stewart realized that Hudson was receiving $.20 per hour more than he.

Stewart testified that, in late September, he spoke to foreman Todd Carey, his immediate supervisor, about the discrepancy between his wage rate and Hudson's. According to Stewart, Carey said that he would "check into it." Having heard nothing from Carey by mid-October, Stewart spoke about the discrepancy to production superintendent McDaniel. McDaniel also told Stewart that she would "check into it," but she did not thereafter contact Stewart about the matter. (Carey did not testify; McDaniel testified, but she did not dispute the testimony of Stewart about his request to her, the timing of that request, or her failure to respond to his request.) Stewart further testified that in late October he stopped Paul Dedman (again, the Employer's vice president in charge of manufacturing) as Dedman was walking through the plant. Stewart also told Dedman about the discrepancy between his wage rate and that of Hudson (whom Stewart was still training). Dedman replied that he had not known of the problem, and Dedman told Stewart that he would "most definitely check into it." According to the Employer's records, on November 3 Stewart was granted a $.20 per hour "merit increase." Dedman testified, but he did not dispute Stewart's account of their conversation or the timing of it. Dedman testified that after hearing Stewart's request, "I talked to Alan Bates about it, explained the situation to him and we decided that we should adjust Steve's pay equal to what the other gentleman [Hudson] was making."

When he was called as a witness by the Union, Bates testified that he began to investigate whether the set-up job deserved $.20 per hour more when Hudson bid into the job. Just when Hudson bid into the set-up job is not in the record, but Bates acknowledged that it was "several months" before November 3. Bates also testified that he again reviewed the matter of Stewart's wages after Dedman told him of his exchange with Stewart. After studying the matter again, he decided that the job did deserve more money, and he ordered the wage increase for Stewart that took effect on November 3. At the same time, he ordered $.20 per hour merit wage increases for six laboratory (non-unit) personnel who were in the "same general grade" as Stewart. (The six non-unit employees and Stewart were moved from $13.50 to $13.70 per hour, which was also Hudson's rate.) Bates acknowledged that he had never before given merit wage increases to seven employees at the same time. Bates further acknowledged that no unit personnel, other than Stewart, received a wage increase at the time.

In *ARA Food Services*, 285 NLRB 221, 222 (1987), the Board stated the "well established principle":

> [W]hen a benefit is granted during the critical period before an election, the burden of showing that the timing was governed by factors other than the pendency of the election is on the party who granted the benefit. The logic behind this legal principle is clear: only the party granting the benefit can explain why it chose to do so. An employer meets that burden if it presents evidence which establishes justification for its action.

That is, a grant of benefits during the critical pre-election period will be considered unlawful, and objectionable in a representation case, unless the employer comes forward with an explanation, other than the pending election, for the timing of such action. *Honolulu Sporting Goods*, 239 NLRB 1277, 1280 (1979), enfd. 620 F.2d 310 (9th Cir. 1980). Therefore, the burden is on the Employer to show why it granted the wage increase to Stewart after the petition was filed on October 18.

On brief, the Employer argues: "The Company gave Mr. Stewart a raise at that time because it was consistent with the raise given other employees in his same job grade, and was in compliance with the provisions of the collective bargaining agreement." The contract did allow merit wage increases, but this proposition begs the question of why the Employer granted the wage increase to Stewart at the time that it did. Also, although the Employer established that the non-unit laboratory personnel had been making the same wage rate as Stewart as of November 3, it did not establish that they were receiving that wage rate

because they were in the same "job grade." Moreover, no other unit employees in Stewart's job grade (or any other job grade) received a wage increase at the time.

The Employer further argues on brief that the grant to Stewart could have had no impact on the employees' free choice because it occurred a full three months before the February 20 election. In *Exchange Parts Company*, 375 U.S. 405 (1964), however, the Supreme Court, with dramatic imagery, described the potential evil of the use of grants of wage increases during an organizational campaign:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

As well as being unlikely to miss the coercive inference in the first place, employees such as Stewart are not likely to forget that inference, even after three months. Finally, the Employer on brief cites *NLRB v. Circo Resorts, Inc*., 646 F.2d 403 (9th Cir. 1981), for the proposition that it has met its burden of proving that it granted the wage increase to Stewart for reasons other than the pending election. In *Circo Resorts*, however, the court made a finding that the employer had granted critical-period wage increases to two employees only because they had threatened to quit if it did not. Aside from the fact that I am immediately bound by the Board's decision in that case,[20] the Employer does not suggest that Stewart made any such demand to it.

I further do not believe that Stewart's wage increase was the product of a disinterested wage-rate study by Bates. Bates was simply incredible in his testimony that he had been studying the wage rates of the laboratory technicians and Stewart for a long period of time, but he just happened to arrive at the decision to make the grants immediately after Dedman advised him of Stewart's complaint. Moreover, had Bates been previously studying Stewart's wage rate, he would have consulted with Carey and McDaniel; if Bates had contemplated anything beyond an abstract study, Dedman assuredly would have been consulted also. Nevertheless, when Stewart complained about the discrepancy between his wage rate and Hudson's, Carey and McDaniel told him nothing, and Dedman professed complete surprise.

Bates did identify a memorandum from himself to his payroll clerk which contained a detailed justification for the wage increases to Stewart and the six laboratory employees. The payroll clerk, whose job was dependent on following Bates' orders, would hardly have required the elaborate justification before doing what he was told. I believe that Bates' memorandum was a part of a cover-story fabrication, and nothing short of it. I firmly believe, and find, that the laboratory personnel received a wage increase because Stewart received one, not the other way around.

Finally, although Bates testified that the wage increase given to Stewart was the result of several months' study, and that it was given only as part of a raise to employees in a certain labor grade, Dedman testified that he and Bates only conferred after Stewart made his complaint about the wage discrepancy, and "we decided that we should adjust Steve's pay equal to what the other gentleman [Hudson] was making."

In the process of deciding whether to grant benefits while a question concerning representation is pending, employers have the duty to act precisely as they would if no such question were pending.[21] In this case, before the question concerning representation was raised by the decertification petition, the Employer resolved the matter of wage discrepancies in the set-up classification by cutting the wage rate of the higher-paid employee (Peak). Also before the question concerning representation was raised, the

[20] *Circus Circus*, 244 NLRB 880 (1979).
[21] *McCormick Longmeadow Stone Co.*, Inc., 158 NLRB 1237, 1242 (1956).

Employer simply ignored Stewart's protestations that he was being paid less than the employee whom he was training (Hudson). After the question concerning representation was raised, however, the Employer remedied Stewart's long-standing grievance, and it resolved the matter of the set-up wage discrepancy, by raising Stewart's pay. To have been consistent after the petition was filed, the Employer would have had to continue to ignore Stewart's request for parity with Hudson or, at most, the Employer would have had to tell Stewart that the matter would be looked into after the election (with, of course, no promises being made). Instead, the Employer granted Stewart precisely the wage increase for which he had been asking since before the petition was filed.

Especially in view of the fact that the election ended in a tie, I conclude that by granting the November 3 wage increase to Stewart, the Employer interfered with the employees' free choice in the February 20 election, and I shall recommend that this objection to the election be sustained.

The Objections to the Election

I find that the Union's objection that is based on the Employer's promulgation and maintenance of a discriminatory no-solicitation rule, and the Union's objection that is based on the Employer's grant of a wage increase to an employee in order to discourage employees from voting for the Union, are valid because such conduct reasonably would have interfered with the free choice of the employees. I therefore conclude that the election held on February 20, 1998, must be set aside and that a new election must be held at such time as the effects of the objectionable conduct found herein are dissipated to the extent that a free and fair election may be held.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The complaint is dismissed.

IT IS FURTHER ORDERED that the election held on February 20, 1998, in Case 9–RD–1839 is set aside and that this case is severed from case 9–CA–35633 and remanded to the Regional Director for Region 9 of the Board for the purpose of conducting a new election at such time as he or she deems the circumstances permit the employees' free choice of a bargaining representative.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems it to be appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employees employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in any economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Union of Needletrades, Industrial and Textile Employees (UNITE), and its Local 267.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington D.C. Novemberer 17, 1998.

David L. Evans
Administrative Law Judge